STATE OF MICHIGAN

COURT OF APPEALS

ANDREA FRANTOM, by her appointed conservator, PASTOR PEDRO VALDEZ,

Plaintiff-Appellant,

v

DR. CHERYL ANN MORROW-BRADLEY,

Defendant-Appellee,

and

COMMUNITY MENTAL HEALTH CENTER,

Defendant,

and

CONNIE LAWSON-MILLER and NANCY BYRD-SCHULZ,

Third-Party Defendants.

UNPUBLISHED
February 11, 2000

No. 211159
Lenawee Circuit Court
LC No. 96-007093-NM

Before: Gribbs, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right an order of the circuit court granting defendant Cheryl Ann Morrow-Bradley's motion for summary disposition and dismissing plaintiff's second amended complaint without prejudice to its re-filing in the State of Ohio. We reverse and remand for further proceedings.

I

Defendant is a psychologist licensed in both Michigan and Ohio who counseled Connie Lawson-Miller, the mother of minor plaintiff, Andrea Frantom. Plaintiff's original complaint alleged that

from 1985 through 1989 defendant Cheryl Ann Morrow-Bradley was employed by defendant Community Mental Health in the State of Michigan. The complaint further alleged that during her counseling sessions with defendant Cheryl Ann Morrow-Bradley, Ms. Lawson-Miller voiced concerns from 1986 through 1991 that the minor plaintiff was being abused by her stepfather. It was alleged in the original complaint that defendant committed malpractice by, among other things, "[f]ailing to report child abuse under MCL 722.623 [MSA 25.248(3)] and/or O.R.C. [Ohio reporting statute] 2151.421." Defendants answered the original complaint and asserted affirmative defenses. However, none of defendants' affirmative defenses alleged lack of personal jurisdiction.

On March 4, 1998, plaintiff filed a second amended complaint that repeated the prior common allegations against defendant but separated as count I "malpractice of Dr. Cheryl Morrow-Bradley while employed at Community Mental Health Services of Lenawee" County and as count II "malpractice of Dr. Cheryl Morrow-Bradley as a private practitioner." In response to the second amended complaint, defendant filed an answer and affirmative defenses. Again, lack of personal jurisdiction was not alleged by defendant in her affirmative defenses. However, defendant did assert:

> This court lacks *subject-matter jurisdiction* over the defendant Dr. Cheryl Morrow-Bradley in that defendant Dr. Cheryl Morrow-Bradley in her capacity as a private practitioner practiced exclusively in the State of Ohio. Accordingly, this defendant would be bound by the common law and the statutes of the State of Ohio, and defendant's negligence, if any, should be determined by Ohio courts and an Ohio jury. [Emphasis added.]

Defendant also filed a motion for summary disposition "pursuant to MCR 2.116(C)(4)" (the court lacks jurisdiction of the subject matter). In her motion, defendant argued the lack of subject-matter jurisdiction, lack of venue pursuant to MCL 600.1629; MSA 27A.1629, and choice of law ("this court should determine that the doctrine lex loci delicti mandates application of Ohio law under the instant set of facts and circumstances" [and that "venue" is therefore appropriate in the State of Ohio, not Michigan]). Defendant argued that because count I of plaintiff's second amended complaint was dismissed after settlement, that the only allegations remaining are those contained in count II relating to defendant's counseling of Connie Lawson-Miller after defendant moved to the State of Ohio.

The circuit court agreed with defendant's arguments and granted summary disposition in favor of defendant. The order specifies that the dismissal is without prejudice to plaintiff re-filing the action in the State of Ohio. The court ruled, in pertinent part, as follows:

> I don't think there's any question that [if] this action were filed today, it could not be filed in Michigan. It would have to be filed in the State of Ohio, because that's where this cause of action arose. It arose entirely in the State of Ohio. And this case will be governed by the Ohio law. In the interests of judicial economy, the case could be more easily tried in Ohio. In this Courthouse there's not a – to my knowledge, there's not a single book that contains any Ohio law. All contact for the defendant is, according to the affidavit, was in Ohio. All services were provided in Ohio. They were

> gratuitous. The defendant was a part-time practitioner. She never solicited this or any other patient from Michigan.
>
> . . . I don't think this Court has any jurisdiction, but even if it has jurisdiction, the most convenient forum is Ohio. That's – Ohio's the most appropriate forum. I think this case very properly should be decided in Ohio using the Ohio law.
>
> For either reason, for each reason, this case is dismissed without prejudice.

II

On appeal, plaintiff argues that defendant and the lower court have confused the concepts of subject-matter jurisdiction, limited personal jurisdiction, and venue. We agree.

A

In *People v Eaton*, 184 Mich App 649, 652-653; 459 NW2d 86 (1990), aff'd 439 Mich 919; 479 NW2d 639 (1992), this Court explained the distinction between subject-matter jurisdiction and personal jurisdiction:

> Jurisdiction involves the two different concepts of subject-matter jurisdiction and personal jurisdiction. Subject-matter jurisdiction encompasses those matters upon which the court has power to act. Personal jurisdiction deals with the authority of the court to bind the parties to the action. Subject-matter jurisdiction is never waivable nor may it be stipulated to by the parties. Personal jurisdiction, however, is always waivable and defects may be corrected by stipulation.

In the present case, defendant has waived the defense of lack of personal jurisdiction by failing to assert the affirmative defense in either her answer to the original complaint or her answer to the second amended complaint. MCR 2.116(D)(1). *Van Pembrook v Zero Mfg. Co*, 146 Mich App 87, 95; 380 NW2d 60 (1985). Even if the defense were not waived, Michigan possesses limited personal jurisdiction over defendant pursuant to Michigan's long-arm statute, MCL 600.705; MSA 27A.705. Under the facts and circumstances of the present case, which involves a defendant licensed to practice psychology in the State of Michigan who continues an ongoing relationship with a Michigan resident after moving to Ohio and commits acts allegedly resulting in injury to a minor plaintiff in the State of Michigan, the long-arm statute and the sufficient minimum contacts required by the due process clause of the Fourteenth Amendment are satisfied. See *Int'l Shoe Co v Washington*, 326 US 310; 66 S Ct 154; 90 L Ed 2d 95 (1945), and *Starbrite Distributing Inc v Excelda Manufacturing Co*, 454 Mich 302; 562 NW2d 640 (1997). Cf. *Woodward v Keenan*, 79 Mich App 543; 261 NW2d 80 (1977), aff'd (After Remand) 88 Mich App 791; 279 NW2d 317 (1979).

B

Next, plaintiff argues that the lower court erred in granting defendant's motion for summary disposition based on an alleged lack of subject-matter jurisdiction. Again, we agree. Subject-matter

jurisdiction is "the right of the court to exercise judicial power over the class of cases, not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending." *In re Waite*, 188 Mich App 189, 199; 468 NW2d 912 (1991) (quoting with approval *Pease v North American Finance Corp*, 69 Mich App 165, 168; 244 NW2d 400 (1976). In Michigan, the circuit court is a court of general jurisdiction, having "original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." MCL 600.605; MSA 27A.605. With regard to malpractice claims, our Supreme Court has held that malpractice claims are traditional civil actions for money damages that currently fall within the circuit court's subject-matter jurisdiction. *Campbell v St John Hosp*, 434 Mich 608; 614; 455 NW2d 695 (1990). Further, plaintiff's complaints alleged the then sufficient amount in controversy of more than $10,000 to invoke the subject-matter jurisdiction of the circuit court. MCL 600.8301(1); MSA 27A.8301(1).

C

Plaintiff also argues that the lower court erred in granting defendant's motion for summary disposition on the basis that "the most convenient form [sic] is Ohio." We agree. Here, the lower court confused Michigan's venue statute with the doctrine of subject-matter jurisdiction. First, the statute itself provides that "the provisions of this chapter relate to venue and are not jurisdictional." MCL 600.1601; MSA 27A.1601. Second, the county where the cause of action is to be tried refers to counties in the State of Michigan and not counties of other states. See *Hoffman v Bos*, 56 Mich App 448, 455-456; 224 NW2d 107 (1974). Third, the issue has been waived. MCR 2.221(A). Finally, even were we to consider which county in the State of Michigan is proper venue, Lenawee County was clearly proper because of plaintiff's claims against codefendant Community Mental Health Center. In this regard, MCL 600.1641(1); MSA 27A.1641(1) provides in pertinent part:

> . . . if causes of action are joined, whether properly or not, venue is proper in any county in which either cause of action, if sued upon separately, could have been commenced and tried . . .

It is well settled that venue is determined at the time the complaint is filed. *Kerekes v Bowlds*, 179 Mich App 805, 808; 446 NW2d 357 (1989); *Brown v Hillsdale Co Rd Comm*, 126 Mich App 72, 76-78; 337 NW2d 318 (1983).

D

Finally, plaintiff argues that the lower court erred in granting defendant's motion for summary disposition on the grounds that Ohio, not Michigan, law would apply. In this regard, we agree with plaintiff that even if Ohio law were to apply, such a choice of law determination does not divest the Michigan circuit court of its subject-matter jurisdiction. Although it may be more difficult to do so, Michigan courts are called upon to decide cases applying the law of another state. See, e.g., *Farrell v Ford Motor Co*, 199 Mich App 81; 501 NW2d 567 (1993); *Hampshire v Ford Motor Co*, 155 Mich App 143; 399 NW2d 36 (1996).

On remand, the court is to rule on the choice of law issue by applying the modern doctrine articulated in *Sutherland v Kennington Truck Service Ltd*, 454 Mich 274; 562 NW2d 466 (1997). We reiterate that even if Ohio law were applied, such a ruling does not divest the Lenawee Circuit Court of its subject-matter jurisdiction.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ William B. Murphy
/s/ Richard Allen Griffin